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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MASIMO CORPORATION

Plaintiff,

v.

POLITAN CAPITAL
MANAGEMENT LP, POLITAN
CAPITAL MANAGEMENT GP LLC,
POLITAN CAPITAL PARTNERS GP
LLC, POLITAN CAPITAL NY LLC,
POLITAN INTERMEDIATE LTD.,
POLITAN CAPITAL PARTNERS
MASTER FUND LP, POLITAN
CAPITAL PARTNERS LP, POLITAN
CAPITAL OFFSHORE PARTNERS
LP, QUENTIN KOFFEY, MICHELLE
BRENNAN, MATTHEW HALL,
AARON KAPITO, WILLIAM
JELLISON, DARLENE SOLOMON,

Defendant(s).

Civil Action No. 8:24-cv-01568-JVS-JDE

**PLAINTIFF'S MEMORANDUM OF
POINTS & AUTHORITIES IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

Hearing Date: September 9, 2024
Time: 1:30 PM
Courtroom: 10C
Honorable James V. Selna

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I. INTRODUCTION

Masimo stockholders face a monumental decision in just two months: should Masimo’s independent board, led by the Company’s inspirational founder, Chairman, and CEO, Joe Kiani, run the Company or should stockholders allow Politan Capital Management LP (“Politan”) and its avaricious founder and activist investor, Quentin Koffey, to take full control of the Board with only 9% ownership of Masimo. Under the federal securities laws, the stockholders must be allowed to make that decision based on truthful information and facts, not misrepresentations. Koffey and Politan, however, have made several misleading statements in their SEC filings and other public forums to turn the stockholders against the Mr. Kiani and the non-Politan Board. This is all part of a multi-year plan to gain control of Masimo on false pretenses *while depriving Masimo’s stockholders a valuable control premium* (a premium often valued at an additional 20%-40% that would otherwise go to all of Masimo’s stockholders). If Masimo stockholders vote in the upcoming annual meeting to support Politan’s two new director nominees based on the misrepresentations made to date, Koffey and Politan will have achieved their goal.

Court intervention is necessary to prevent Koffey and Politan from taking control of Masimo based on several false statements and material omissions, including by misleading Masimo stockholders about potential strategic transactions that had the potential to enrich all stockholders (not just Koffey, who will reap the benefits of taking control for free), and Koffey’s collaboration with other lawyers in support of legal claims against Masimo’s Board and its interests in violation of his fiduciary duties. If Defendants mislead Masimo’s stockholders into casting an uninformed vote at the Annual Meeting, Masimo and its stockholders will be irreparably harmed as the Company is turned over to a dissident stockholder. At that point, Koffey and Politan will be empowered to undertake all manner of corporate actions that cannot be unwound. This is exactly why the Supreme Court

1 has instructed that “in corporate control contests the stage of preliminary injunctive
2 relief, rather than post-contest lawsuits, is the time when relief can best be given.”
3 *Piper v. Christ–Craft Indus.*, 430 U.S. 1, 42 (1977). The relief Masimo seeks is
4 simple—an order enjoining Koffey and Politan from voting any proxies they
5 solicited until they correct their false statements.

6 **II. STATEMENT OF FACTS**

7 **A. Masimo and the First Proxy Fight With Politan**

8 Since Mr. Kiani founded Masimo in his garage in 1989, it has grown into a
9 leading health technology and consumer electronics company that employs nearly
10 8,000 people in California and around the world, generating \$2 billion in revenues
11 per year. Compl. ¶ 3. Masimo manufactures life-saving patient monitoring
12 devices and technologies, including non-invasive sensors, patient management
13 tools, and telehealth platforms. *Id.*

14 Koffey, in contrast, is a self-described “veteran activist” with no experience
15 running a healthcare company. *Id.* ¶ 55. Koffey has never held a senior
16 management position at any medical or consumer technology company (or any
17 public company), has no prior investment experience in the medical device
18 industry, and had no public company board experience before joining Masimo’s
19 Board in 2023. *Id.* ¶ 5. Instead, Koffey and Politan have launched successful
20 proxy contests against Centene Corporation and Azenta Life Sciences, both of
21 which have underperformed the S&P 500 since. *Id.*

22 In 2022, Koffey and Politan set their sights on Masimo, surreptitiously
23 acquiring a stake of over 8% and demanding representation on Masimo’s Board.
24 *Id.* ¶ 4. Masimo was rightfully concerned, given Koffey’s (i) refusal to disclose his
25 intentions and backers and (ii) record of value destruction at his target companies.
26 *Id.* ¶ 5. When Masimo refused Koffey’s demand, he vowed to “wage war” on
27 Masimo and Mr. Kiani. *Id.*

1 In 2023, Politan nominated Koffey and Brennan to fill the two seats up for
2 reelection. *Id.* ¶ 6. Koffey represented to Masimo’s stockholders and privately to
3 Masimo that he had no intention of trying to take control of Masimo and simply
4 wanted to work with Mr. Kiani. *Id.* Based on these and other misstatements,
5 Koffey and Brennan were elected. *Id.* ¶ 7. And while Koffey represented to
6 Masimo and its stockholders that he would stop there, he did not. *Id.*

7 **B. Politan Directors Refuse to Fulfill Their Duties and Sabotage**
8 **Value-Maximizing Plans**

9 The Board and Masimo management welcomed Koffey and Brennan to the
10 Board, including through an extensive onboarding process consisting of thousands
11 of pages of historical Board materials, financials, and Company policies, full
12 access to Masimo’s key executives, and multiple meetings with Masimo
13 management and its outside advisors. *See id.* ¶¶ 68-69. They were updated about
14 the Board’s decision to delegate authority to management to retain a financial
15 advisor to explore strategic options available to Masimo. *Id.* ¶¶ 204. Koffey and
16 Brennan, as Board members, also received regular quarterly updates from
17 Masimo’s CEO, CFO, and General Counsel. *See id.* ¶ 71. As a member of the
18 Audit Committee, Koffey routinely met with Masimo’s independent auditor and
19 Masimo management team and had a chance to ask questions about any aspects of
20 Masimo’s financials. *Id.* ¶ 72.

21 But little did Mr. Kiani, the rest of the Board, and Masimo management
22 know that Koffey and Brennan had no intention of fulfilling their duties as
23 directors. Since being elected, neither has ever proposed a single concrete step (let
24 alone plan) to maximize long-term stockholder value. *Id.* ¶ 10. Instead, Koffey
25 and Brennan embarked on a value-wrecking campaign to take over Masimo in
26 2024 without paying a control premium to Masimo’s stockholders. *Id.*
27 Accordingly, they purposefully buried their heads in the sand, refused to educate
28 themselves on Masimo’s financial information, refused to engage with Masimo’s

1 outside auditors, refused to approve and sign Masimo's periodic filings with the
2 SEC, and falsely claimed Masimo had not provided them with important financial
3 information—all to undermine the Company's credibility with investors, at the risk
4 of jeopardizing timely SEC filings. *Id.*

5 For example, despite extensive onboarding, obtaining all requested
6 information, and attending all board meetings, all Audit Committee meetings, all
7 Compensation Committee meetings and all Nominating, Compliance, and
8 Corporate Governance Committee meetings since joining the Board, the Politan
9 Directors have consistently refused to approve the issuance any of Masimo
10 required financial statements. *See id.* ¶ 73; Ex. 1 at 3; Ex. 2 at 4; Ex. 3 at 2-3.

11 Among other reasons, they claim they received insufficient information to sign-off
12 on Masimo's SEC reports but failed to identify what information was missing.
13 Compl. ¶ 77. Confirming that this excuse was mere pretext to set up a second
14 proxy fight, the Politan Directors encouraged other Board members to approve the
15 same annual report. *Id.* ¶ 78. At no point have the Politan Directors identified
16 anything in the financial statements they believe are unreliable or misstated. *Id.*

17 The Politan Directors also have consistently declined to offer constructive
18 ideas and strategies for Masimo, instead actively working to sabotage value-
19 maximizing plans. *Id.* ¶ 79. In a private meeting in January 2024, Mr. Kiani
20 proposed to Koffey spinning off Masimo's Consumer Products Business. *Id.* ¶ 11.
21 Koffey first supported the idea and presented Mr. Kiani a term sheet for the
22 proposed deal shortly thereafter, including that: (1) Mr. Kiani would be paid all
23 amounts due to him under his employment agreement in connection with the
24 proposed transaction, and (2) Mr. Kiani would be provided an opportunity to
25 acquire either voting control or majority ownership of the spun-off company's
26 stock, including in exchange for consideration to be determined later. Ex. 4 at 1.

27 At the next Board meeting in February 2024, the Board formed a special
28 committee, led by Koffey, to consider the potential spin-off further. Ex. 5 at 5-11.

1 Once appointed, it became clear that Koffey intended for the potential spin-off to
2 fail. In March 2024, the Special Committee’s legal counsel sent Mr. Kiani a new
3 term sheet with proposed terms that were entirely different than those proposed by
4 Koffey in January, leaving it insolvent. Compl. ¶ 86. Koffey represented to Mr.
5 Kiani that these new terms reflected the Special Committee’s views. *Id.* ¶ 87. Not
6 so. The other members of the Special Committee informed Mr. Kiani that the
7 March term sheet represented a new proposed transaction and that they also shared
8 Mr. Kiani’s concerns that such a transaction would lead to an unviable consumer
9 business. *Id.* Rather than end the process, Masimo’s independent directors sent
10 Koffey an updated proposal for the potential spin-off, at which point Koffey stated
11 that he no longer wanted to engage in the transaction. *Id.* ¶ 88. Mr. Kiani even
12 said that he would forgo any controlling interest in the Consumer Products
13 Business and would remain with Masimo as its CEO and Chairman, leading to no
14 change of control special payments. *Id.* Koffey still refused to engage and tanked
15 the process, falsely claiming that Mr. Kiani was to blame. *Id.* ¶ 84.

16 After Koffey killed the spin-off, Masimo’s management received an offer
17 for the Potential Joint Venture for acquisition of a majority of the Consumer
18 Products Business. *Id.* ¶ 12. The Potential Joint Venture would have given
19 Masimo the ability to monetize 85% of the Consumer Product Business at an
20 attractive multiple, while paying down debt and providing stockholders with some
21 residual ownership in the business. *Id.* ¶ 97. Masimo announced this plan to the
22 market on Friday, March 22, 2024, and the stock price spiked 14% in after-hours
23 trading on the news. Ex. 7.

24 But a successful joint venture would undermine Koffey’s efforts to take
25 control, so Koffey once again sabotaged Masimo’s share price gains by
26 announcing—on the very next business day—that he would nominate two so-
27 called “independent” candidates for Masimo’s Board and disparaging Mr. Kiani
28

1 and the rest of the Board. Ex. 8. Koffey's lies had the desired impact: Masimo's
2 stock immediately dropped 9%. Ex. 7.

3 Recognizing the potential stockholder value, Masimo's management pressed
4 forward with evaluating the Potential Joint Venture. On May 8, 2024, all non-
5 executive Board members were asked to sign a confidentiality agreement. Koffey
6 and Brennan refused to sign. Compl. ¶ 95. That same day, Mr. Kiani asked the
7 Board to meet the next week to review and discuss a proposed non-binding term
8 sheet of the Potential Joint Venture. *Id.* On May 13, 2024, all members of the Board,
9 *including Koffey and Brennan*, were told the Potential Joint Venture Partner's
10 identity. *Id.* ¶ 96. The full Board also received other background materials about
11 the Potential Joint Venture, including a proposed non-binding term sheet, a proposed
12 exclusivity agreement, materials providing a preliminary analysis of the potential
13 Consumer Products Business separation, and a preliminary financial analysis. *Id.*
14 In response, Politan Directors urged the Board to delay any further assessment until
15 after the annual meeting, presumably to prevent Masimo from negotiating a
16 favorable deal that might harm the Politan Nominees' election chances. *Id.* ¶ 99.

17 **C. Defendants Launch Second Proxy Contest Through False and**
18 **Misleading Proxy Materials**

19 Now, Koffey and Politan seek full control over Masimo, without regard to
20 the harm to stockholders. *See generally* Ex. 10.

21 Politan filed its Preliminary Proxy Statement on Schedule 14A on June 3,
22 2024 ("Politan Preliminary Proxy," attached as Exhibit 10) and its Definitive
23 Proxy Statement on June 21, 2024 ("Politan Definitive Proxy," attached as Exhibit
24 12), and together with the Preliminary Proxy Statement, the "Politan Proxy
25 Statements"). Since filing the Politan Proxy Statements, Politan, Koffey, and
26 Brennan have released additional materials to stockholders, including (1) a June
27 26, 2024 letter to investors, Ex. 13; (2) a June 26, 2024 investor presentation, Ex.
28 14; (3) a July 1, 2024 "Correcting the Record" investor presentation, Ex. 15; and

(4) a July 11, 2024 letter to stockholders urging a “cultural reset,” Ex. 16, (together with the Politan Proxy Statements, the “Politan Proxy Materials”). The Politan Proxy Materials ask stockholders to vote on a control slate: *i.e.*, if Politan succeeds in electing the two Politan Nominees, the Politan Nominees will, when added together with the existing Politan Directors, constitute a majority of the Board. Ex. 12 at 2. The Politan Proxy Materials make false and misleading statements and omissions about numerous topics and events, including, among other things, the following: (1) Koffey’s secret relationship with Derivative Action plaintiffs’ counsel; (2) the proposed spin-off of the Consumer Products Business and Special Committee overseeing that potential transaction; (3) the Potential Joint Venture; (4) the Politan Directors onboarding and information they received during their Board tenure; and (5) the Board’s grant of authority to management in connection with a potential sale of the Company. *See* Compl. ¶¶ 118 – 206; Exs. 10; 12-16.

The Politan Proxy Materials also misrepresent a very real risk facing Masimo: if the Nominee Defendants are elected, Masimo may owe Mr. Kiani 2.7 million Restricted Stock Units (“RSUs”) under an operative change-in-control provision in his employment agreement. Politan baselessly claimed to stockholders that these provisions are unenforceable and in any event, that Politan can avoid granting the RSUs by offering to reappoint Mr. Kiani as chair. Ex. 12 at 22. This is wrong. Mr. Kiani has indicated that if stockholders choose Politan, he will respect their decision and decline to return. Compl. ¶ 170. And under the employment agreement, a change in control will have been affected. Ex. 17 at 9-10.

But Koffey has not stopped at lying to stockholders to get his way. He has even collaborated with plaintiffs’ counsel in a lawsuit *against* the Board. By way of background, on May 1, 2024, Wolf Haldenstein Adler Freeman & Herz LLP (“Wolf Haldenstein”) filed a derivative complaint on behalf of a Masimo stockholder against the Board, including Koffey (“Derivative Action”), alleging

1 the Board harmed Masimo by pushing through an acquisition of an audio
2 equipment company. *See* Ex. 11. The Derivative Action is based on the same
3 allegations at issue in a separate securities class action filed against Masimo and
4 remains pending, *Vasquez v. Masimo Corp.*, Case No. 3:23-cv01546-L-DEB (S.D.
5 Cal.) (“Securities Class Action”). *Id.* at 2.

6 In connection with Koffey’s second proxy contest, Masimo commissioned
7 an investigation and diligence on the candidates Politan nominated for the Board.
8 Compl. ¶ 103. During that diligence, two confidential witnesses were identified
9 who reported that Koffey has been “working closely” with Wolf Haldenstein in the
10 Derivative Action. *Id.* One of the confidential witnesses reported that “Koffey is
11 ‘actually named as a defendant [in the Derivative Action], but he doesn’t care. He
12 will use whoever will get him to where he needs to go.’” *Id.* As a member of the
13 Board, Koffey has confidential and privileged information about Masimo. Sharing
14 that information with opposing counsel not only assists plaintiff in the Derivative
15 Action against the Board, but risks that information being used *against Masimo* in
16 the Securities Class Action. *See id.* ¶104. Any effort to support the bogus claims
17 in the Derivative Action directly undermines Masimo’s defense in the Securities
18 Class Action, a fact of which Koffey is well aware.

19 If successful, Koffey will have realized his goal of taking control of
20 Masimo: his hedge fund will have four Board seats, allowing Koffey to direct
21 Masimo as he pleases without the payment of a control premium to the
22 stockholders. *Id.* ¶ 14. Put differently, Koffey (and Politan) will have taken
23 control of Masimo without providing any financial benefit to Masimo stockholders
24 associated with the change in control. That control premium is incredibly valuable
25 and can range from 20-40% of stockholder value. *Agranoff v. Miller*, 791 A.2d
26 880, 899 (Del. Ch. 2001) (recognizing that control premiums are valuable and can
27 range from 20-40% and ultimately applying a 30% control premium adjustment in
28 its valuation analysis). If Koffey takes control based on the misstatements and

omissions in the Politan proxy materials, he will be empowered to dismantle Masimo in any form or fashion he wishes. *Id.* ¶ 14.

III. PROCEDURAL HISTORY

On July 15, 2024, Plaintiff filed this lawsuit against Defendants alleging violations of Section 14(a) of the Exchange Act, and the rules promulgated thereunder, as well as breach of fiduciary duty and breach of contract claims. *See id.* Plaintiff's Complaint details Defendants' violations of Section 14(a) and Rule 14a-9. Masimo stockholders should not be forced to make important decisions about the future of Masimo until these claims are resolved. Plaintiff's Complaint thus seeks: (1) an order declaring that the Politan Proxy Materials on Schedule 14A and all amendments violate Section 14(a) of the Securities Exchange Act, and Rules 14a-9, 14a-12, and 14a-101; (2) an order declaring the Nomination Notice (defined below) does not comply with Masimo's Bylaws; (3) an order enjoining Defendants from voting any proxies received by means of the misleading Politan Proxy Materials; (4) an order invalidating any proxies Defendants or other persons acting in concert with them obtained pursuant to the misleading Politan Proxy Materials; and (5) an order requiring Defendants to correct their material misstatements and omissions, and to furnish accurate disclosures required by law before the annual stockholder meeting. *Id.* at 69-70

Masimo's 2024 Annual Meeting of Stockholders was previously scheduled for July 25, 2024. *Id.* at 114. During the time Politan's Proxy Materials were being released to the public, Koffey sent two letters to Masimo claiming that a stockholder was engaged in "empty voting" and asking Masimo to set a new record date for Annual Meeting. Ex. 18; Ex. 19. One of those letters was just last Friday. *Id.* While there is no merit to this claim, Mr. Kiani agreed to propose that the Board consider setting a new record date and new meeting date for the vote to eliminate the baseless allegations. *See* Ex. 20 at 1. On July 15, 2024, the Board approved this proposal, setting the annual meeting date for September 19, 2024. *See id.*

1 While Masimo believes it has sufficient evidence in this motion to support a
2 preliminary injunction, Masimo is also seeking expedited discovery with this
3 motion. *See Ex Parte Application for Expedited Discovery*, filed concurrently.

4 **IV. ARGUMENT**

5 A preliminary injunction is proper when, as here, Masimo (1) is likely to
6 succeed on the merits; (2) is likely to suffer irreparable harm without preliminary
7 relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the
8 public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). Masimo
9 meets the four elements required for this court to grant a preliminary injunction
10 against Defendants for the Section 14(a) and SEC Rule 14a-9 claims. Specifically,
11 injunctive relief is necessary to prevent Koffey, Brennan, and Politan from
12 executing their plan to takeover Masimo by gaining control of the Board through
13 Masimo stockholder votes obtained through false and misleading information.¹

14 **A. Masimo Is Likely to Succeed on the Merits**

15 Section 14(a) was intended “to promote the free exercise of the voting rights
16 of stockholders by ensuring that proxies would be solicited with explanation to the
17 stockholder of the real nature of the questions for which authority to cast his vote is
18 sought.” *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 381 (1970) (quotation
19 omitted). Consistent with this, a proxy statement violates Section 14(a) if it (1)
20 contains “a material misrepresentation or omission which (2) cause[s] the plaintiff
21 injury and (3) [] the proxy solicitation itself, rather than the particular defect in the
22 solicitation materials, was an essential link in the accomplishment of the
23 transaction.” *N.Y.C. Emps. ’ Ret. Sys. v. Jobs*, 593 F.3d 1018, 1022 (9th Cir. 2010)
24 (quotation omitted) (*overruled on other grounds by Lacey v. Maricopa County*,
25 693 F.3d 896 (9th Cir. 2012)). Each element is satisfied here.

26
27
28 ¹ Because the breach of contract claim asserts that the Nomination Notice breached
the Masimo Bylaws by violating Section 14(a), we focus our discussion on the
14(a) claims.

1 **1. The Politan Proxy Materials Contain False and Misleading**
2 **Statements and Omissions**

3 Masimo is likely to prove that the Politan Proxy Materials contain false and
4 misleading statements and omissions and that there is a substantial likelihood that a
5 reasonable stockholder would consider these misstatements and omissions
6 “important in deciding whether to vote” for the Politan slate. *Allergan, Inc. v.*
7 *Valeant Pharms. Int’l, Inc.*, 2014 WL 5604539, at *15 (C.D. Cal. Nov. 4, 2014). A
8 reasonable stockholder would think twice before voting for the Politan slate if they
9 knew that the Politan Directors were, for example, purposefully sabotaging
10 strategic deals that could increase stockholder value and working with attorneys
11 suing the Board for monetary damages. *See Mind Med. (MindMed) Inc. v.*
12 *Freeman*, 2024 WL 729260, at *2, *4 (S.D.N.Y. Feb. 22, 2024) (complaint pled
13 material misstatements where proxy “materials assert that the defendants
14 ‘attempted to engage constructively with the Board’” but omitted that defendants
15 in fact declined to participate in director selection process).

16 As detailed below, the Politan Proxy Materials are replete with
17 misrepresentations and omissions:

18 **(i) The Politan Directors’ Supposed Commitment to Stockholder**
19 **Interests.** The Politan Proxy Statements claim that Koffey and the Politan
20 Nominees are committed to being fierce advocates for the stockholders and acting
21 in Masimo’s best interests. *See, e.g.*, Ex. 10 at 2 (Politan, “[a]s a significant long-
22 term Stockholder of Masimo,” is “committed to maximizing the value of the
23 Company for all Stockholders”); Ex. 12 at 2 (same). But far from it, Koffey has
24 been secretly collaborating with Wolf Haldenstein in the Derivative Action, which
25 could damage Masimo’s litigation defense strategy in the Securities Class Action,
26 damaging stockholder value. *See* Compl. ¶ 104. Courts have found that
27 misstatements about directors’ intentions are material to stockholders’ voting
28 decisions. *See Allergan*, 2014 WL 5604539, at *15 (finding a material

misstatement where proxy materials failed to disclose directors' true intentions to pursue a hostile takeover); *MindMed*, 2024 WL 729260, at *4 (concluding that the complaint pled material misstatements where proxy materials omitted that defendants declined to participate in director selection process after asserting that they attempted to engage constructively with the board).

(ii) The Potential Spin-Off and the Politan Directors' Manipulation of the Special Committee. The Politan Proxy Statements falsely claims that Mr. Kiani proposed the transaction on terms favorable to him, the Special Committee proposed different terms, and Mr. Kiani then killed the deal and disbanded the Special Committee when he didn't get his way. *See* Ex. 10 at 10-11; Ex. 12 at 9-10. But it was *Koffey* who proposed that Mr. Kiani would (1) control the spun-off company and (2) still be eligible for certain executive compensation. Compl. ¶¶ 80-83; Ex. 4. And the Politan's lawyers March term sheet that deviated from Koffey's January proposal were not the Special Committee's views. Messrs. Reynolds and Classon, the other members of the Special Committee, both agreed that the March term sheet represented an entirely new and unviable proposed transaction. Compl. ¶ 87. And Mr. Kiani did not seek to disband the Special Committee, but instead Mr. Kiani stated that he would forgo any controlling interest in the Consumer Products Business, removing the potential conflict that required the establishment of the Special Committee. *Id.* ¶ 149.

(iii) The Potential Joint Venture and Koffey's Objections to It. The Politan Proxy Statements also claim that "the full Board was also unaware that discussions with a potential joint venture partner were occurring and that the confidentiality agreement with such party had been signed the previous week" and that Masimo "refused to disclose the identity of the potential joint venture partner" to the Board until Koffey made a Section 220 books and records inspection demand on May 8, 2024. Ex. 10 at 11-13; Ex. 12 at 10-12. These statements, too, are false and misleading.

1 In March 2024, a third party indicated to Masimo management that it would
2 be interested in exploring an acquisition of a majority of the Consumer Products
3 Business. Compl. ¶ 12. Masimo entered a confidentiality agreement with this third
4 party on March 20, 2024. *See* Ex. 12 at 10. The Board was provided with more
5 information about discussions about a Potential Joint Venture on April 25, 2024
6 ahead of a planned April 30, 2024 Board meeting. *See* Compl. ¶ 160; Ex. 21 at 2.
7 Contrary to the Politan Proxy Statement’s assertion otherwise, *see* Ex. 10 at 13,
8 Masimo’s management team was not seeking a binding joint venture agreement.
9 Instead, and as discussed during this April 30, 2024 Board meeting, Masimo was
10 working on diligence and discussing a potential non-binding term sheet with the
11 third-party Potential Joint Venture Partner, the terms of which were discussed during
12 this meeting. Ex. 21 at 2. Indeed, that is exactly what happened; Masimo entered a
13 non-binding term sheet weeks later on May 8, 2024. Compl. ¶ 160.

14 And Koffey made no request for the Potential Joint Venture Partner’s identity
15 until May 2, 2024. Compl. ¶ 161. On May 7, 2024, all of the non-executive
16 members of the Board were asked to sign a short-form confidentiality agreement
17 protecting the Potential Joint Venture Partner’s identity, which Koffey and Brennan
18 refused to sign. Compl. ¶ 95. Despite this refusal, on the same day—May 7, *before*
19 *Koffey’s May 8th 220 demand*—Mr. Kiani asked that the Board meet the next week
20 to review and discuss the Potential Joint Venture, including the identity of the
21 potential partner, the terms of the proposed non-binding term sheet, preliminary
22 financial analysis, and proposed next steps. On May 13, 2024, all members of the
23 Board, *including Koffey*, learned the identity of the Potential Joint Venture Partner
24 and received other materials relating to the Potential Joint Venture. Compl. ¶ 96.

25 The Politan Proxy Materials also make false and misleading statements
26 about the actual terms of the Potential Joint Venture, including that Mr. “Kiani is
27 pursuing a separation of a newly formed entity that will take Masimo’s trademarks,
28 trade secrets and licenses to its IP,” which risks “the creation of a new competitor,”

1 and that Mr. Kiani is pursuing the Potential Joint Venture for an “immediate
2 payout of ~400M.” Ex. 13 at 1-2. None of this is true. Certain of Masimo’s
3 intellectual property was initially being considered as part of the potential spin-off
4 that Koffey killed, but Mr. Kiani agreed that would not be part of the Potential
5 Joint Venture. Compl. ¶ 164. And Mr. Kiani is not “enriching” himself. He has
6 put no cash towards the Potential Joint Venture and has never expressed an intent
7 to invest in it. *Id.*

8 **(iv) Mr. Kiani’s Employment Agreement.** The Politan Proxy Materials
9 also make false claims about a provision in Mr. Kiani’s employment agreement
10 under which Mr. Kiani has a right to receive 2.7 million RSUs if there is a change
11 in majority control of the Board over a 12-month period. Compl. ¶¶ 166-67. The
12 Politan Proxy Materials baselessly assert that this change-in-control provision is
13 unenforceable. Ex. 12 at 22. Politan also claims that it could also get around this
14 provision of Mr. Kiani’s employment agreement by reappointing Mr. Kiani as
15 chair to the Board. But if the Politan Nominees win, Mr. Kiani will not even be a
16 director. He will therefore have the right to resign and immediately receive the
17 RSUs that he was granted under the 2015 agreement, constituting around 5% of the
18 Company. Compl. ¶ 170; *see generally* Ex. 17.

19 **(v) The Politan Directors’ Onboarding Process and Information**
20 **Received.** The Politan Proxy Materials also claim that the Politan Directors were
21 never “onboard[ed],” did not receive “basic information,” were “denied...access to
22 management,” and were excluded from Board meetings. Ex. 10 at 6-7, 17; *see*
23 *also* Ex. 13 at 2; Ex. 14 at 24. But the Politan Directors received extensive
24 onboarding briefings and information, including, but not limited to, thousands of
25 pages of Masimo’s historical Board materials and multiple meetings with
26 Masimo’s management team, current Board members, and independent auditor.
27 Compl. ¶¶ 172-73. The Politan Directors were also invited to, and in fact attended,
28 all Board and committee meetings held since they joined the Board. *Id.* ¶ 62.

1 Koffey also claims that the Politan Directors were never provided certain
2 information related to Masimo, including financial information they claimed that
3 they needed to sign off on Masimo's financials and other corporate documents.
4 Ex. 10 at 7-8; *see also* Ex. 14 at 24. That characterization is materially false and
5 misleading for at least four reasons.

6 *First*, Koffey fails to acknowledge that, as a member of the Audit
7 Committee, he had access to the Company's independent auditor, Grant Thornton,
8 and had every opportunity to ask questions about the Company's financials during
9 meetings with the auditor. Compl. ¶ 188.

10 *Second*, the Politan Proxy Statement omits the chronology of what happened
11 around the time of filing the Company's 2023 Annual Report on Form 10-K.
12 Masimo management discussed the draft in detail with the Board, and the majority
13 of the independent directors confirmed that they would sign the 2023 Annual
14 Report. Compl. ¶ 190. Koffey and Brennan, in contrast, refused to sign until they
15 received additional information. The next day, the heads of Finance &
16 Accounting, Cybersecurity, Compliance, Quality, and Supply Chain made
17 presentations to the Board to address the Politan Directors' questions. Compl. ¶
18 191; Ex. 3 at 1-2. Company representatives asked Koffey if there was other
19 information he would need to sign the 10-K. Compl. ¶ 191. Koffey responded no,
20 there was no other information he needed because Masimo had provided
21 everything he asked for. *Id.* In fact, he encouraged the non-Politan Board
22 members to sign the 10-K. *Id.* He, however, still refuse to sign. *Id.*; Ex. 3 at 2-3.

23 *Third*, Koffey claims he has never had the opportunity to review Masimo's
24 impairment analysis, Ex. 10 at 8, despite being a member of the Audit Committee
25 and having unfettered access to the Company's auditor. In any event, Koffey's
26 claim is simply untrue. *See* Compl. ¶ 192.

27 *Fourth*, Koffey specifically met with the head of U.S. sales for the
28 Company, Bilal Muhsin, at least twice in July 2023, rendering his claim that he

1 was never able to speak with the head of U.S. sales demonstrably false. *Id.* ¶ 193.
2 Mr. Muhsin also presented to the Board multiple times during Koffey’s tenure, and
3 Koffey did not request follow-up or other information after those presentations. *Id.*
4 ¶ 193. Similarly, Masimo’s head of the Company’s Consumer Products Business
5 also made presentations to the Board. *See, e.g.*, Ex. 5 at 3. Koffey again did not
6 ask for follow-up information, nor did he request another meeting with the head of
7 Masimo’s Consumer Products Business. Compl. ¶ 193.

8 **(vi) The Board’s Oversight of a Potential Whole-Company Sale Process.**

9 Politan’s proxy statement claims that the Board delegated authority to management
10 to sell the Company “without any obligation to provide process updates to the
11 Board.” Ex. 10 at 6. Politan further claims that “[a]t no point in 2023 after the
12 June Board meeting was the Board ever presented with any strategic options other
13 than a full Company sale,” and that Mr. Kiani eventually told the Board “he was
14 unable to find a deal on what he considered to be satisfactory terms.” *Id.* at 7.

15 Again, this is a lie. The Board did not delegate to management the authority
16 to carry out a sale of the entire Company, much less the authority to negotiate a
17 sale with no oversight or input from the Board. Compl. ¶ 200. Instead, as the June
18 24, 2023 Board meeting minutes that Koffey received recite, the Board made a
19 limited delegation of authority to management to retain and coordinate with a
20 financial advisor to explore whether and what strategic options may be available to
21 Masimo. *Id.* ¶ 201; Ex. 22 at 1-2. Indeed, Koffey began communicating with the
22 Company’s lead banker at Morgan Stanley just two weeks after he joined the
23 Board. *Id.* ¶ 204. The Politan Directors also had a one-hour Zoom call with
24 Morgan Stanley to get up to speed on the process. *Id.* And contrary to their
25 assertion, throughout 2023 and into January 2024, Mr. Kiani did not receive any
26 offers on any terms for a sale of the Company. *Id.* ¶¶ 102-05.

27 Finally, the Politan Proxy Materials omit key information about Politan’s
28 plans for Masimo, should it succeed in the proxy contest. In particular, neither

1 Politan nor Koffey have said anything about their plans for the Company if they
2 were to gain control of the Board without paying any control premium, including
3 their plans for a sale of either all or part of Masimo. *See generally* Exs. 10, 12-16.

4 **2. The Politan Proxy Materials Caused Masimo’s Injury and**
5 **Are an “Essential Link” to Accomplishing the Election of**
6 **the Politan Slate**

7 Masimo satisfies the second and third prongs of the Section 14(a) violation
8 test—loss causation and transaction causation. As for loss causation, Masimo
9 “was forced to expend unnecessary Company resources in waging a proxy contest
10 against” Politan, which was illegitimate because of Politan’s material
11 misrepresentations and omissions. *Enzo Biochem, Inc. v. Harbert Discovery Fund,*
12 *LP*, 2021 WL 4443258, at *9 (S.D.N.Y. Sept. 27, 2021) (finding loss causation
13 where company incurred significant expenses due to proxy contest necessitated by
14 misleading proxy materials); *see also* Compl. ¶ 225. The Politan Proxy Materials
15 are also an “essential link” to achieving the election of the Politan slate. *See Va.*
16 *Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1100 (1991). The Politan Proxy
17 Materials are necessary for Defendants to vote stockholder proxies in support of
18 the Politan Nominees. Moreover, the false and misleading Politan Proxy Materials
19 convinced proxy advisory firms Glass Lewis and ISS to endorse the Politan
20 candidates, which are parroting Defendants’ lies as facts. *See* Ex. 23 (Glass Lewis
21 Report); Ex. 24 (ISS report); *see also Enzo Biochem, Inc. v. Harbert Discovery*
22 *Fund, LP*, 2021 WL 4443258, at *10 (S.D.N.Y. Sept. 27, 2021) (concluding
23 plaintiff pled transaction causation where proxy solicitations persuaded proxy
24 advisory firm to endorse defendants’ candidates, and solicitations misled majority
25 of stockholders into voting for defendants).

26 **3. Defendants Acted with at Least Negligence**

27 Defendants made the misstatements and omissions in the Politan Proxy
28 Materials with the requisite level of culpability, which for Section 14(a) and Rule
14a-9 is mere negligence. *See In re Maxim Integrated Prods., Inc., Deriv. Litig.*,

1 574 F. Supp. 2d 1046, 1066 (N.D. Cal. 2008). Under federal securities laws,
2 negligence is a failure to exercise “reasonable prudence.” *SEC v. Dain Rauscher*,
3 *Inc.*, 254 F.3d 852, 856 (9th Cir. 2001). “Section 14(a) requires proof only that the
4 proxy solicitation was misleading, implying at worst negligence by the issuer. And
5 negligence is not a state of mind; it is a failure, whether conscious or even
6 unavoidable . . . , to come up to the specified standard of care.” *Beck v. Dobrowski*,
7 559 F.3d 680, 682 (7th Cir. 2009) (citation omitted)). Defendants knew that the
8 above attacks on Masimo and Mr. Kiani were not true, which is supported by the
9 sheer number of misstatements and omissions here. *See generally* Compl. These
10 include but are not limited to:

- 11 • Defendants’ wholesale failure to disclose their communications with
12 Derivative Action plaintiffs’ counsel. *See, e.g.*, Compl. ¶¶ 101-104.
- 13 • Misrepresentations that Mr. Kiani proposed a spin-off transaction
14 favorable to himself, when in fact *Koffey* proposed that Mr. Kiani
15 would retain control of the new, spun-off Company and retain his
16 right to the Special Payment under his employment agreement.
17 *Compare* Ex. 10 at 11 *with* Ex. 4 at 1.
- 18 • Misrepresentations that *Koffey* and Brennan never received
19 information during onboarding and their tenure on the Board, despite
20 having access to thousands of pages of materials and Masimo
21 management and advisors. Compl. ¶ 68.
- 22 • Claims about Mr. Kiani’s corporate jet use, when in fact Mr. Kiani
23 either (1) used the jet for business travel or (2) reimbursed Masimo for
24 his travel. *See, e.g.*, Compl. ¶ 195.

B. Masimo Will Suffer Irreparable Harm Absent a Preliminary Injunction

Masimo also satisfies the second prong: likely to suffer irreparable harm without a preliminary injunction. *Winter*, 555 U.S. at 20. Irreparable harm is harm “for which there is no adequate legal remedy, such as an award of damages.” *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). This harm must be imminent. *See Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

The Supreme Court has instructed that “in corporate control contests the stage of preliminary injunctive relief, rather than post-contest lawsuits, is the time when relief can best be given.” *Piper v. Christ-Craft Indus.*, 430 U.S. 1, 42 (1977) (quotation omitted). “[P]reventing an uninformed shareholder vote through corrective disclosures once the inadequate disclosure is discovered is preferable to sorting out post-vote remedies for uninformed shareholders.” *Allergan*, 2014 WL 5604539, at *16. That is why courts have repeatedly found that the threat of an uninformed stockholder vote presents an irreparable harm when the vote involves “significant changes to [] corporate governance,” including major board elections. *Allergan*, 2014 WL 5604539, at *16 (finding irreparable harm and ordering defendants to make corrective proxy disclosures before stockholder vote on proposals, including to remove a majority of board members); *see also Taseko Mines Ltd. v. Raging River Cap.*, 185 F. Supp. 3d 87, 93-94 (D.D.C. 2016) (finding irreparable harm where uninformed stockholder vote could “significantly affect who wins several director positions” and board control, and “sorting out post-vote remedies” would be difficult because the vote would cause a change of control). So too here. If Defendants are allowed to vote any proxies they solicited in violation of Section 14(a) and if other similarly uninformed stockholders vote for the Politan Nominees, Politan will have gained majority control of the Board and Masimo on false pretenses—all without providing Masimo stockholders with a control

1 premium. *See* Compl. ¶¶ 14-15; *see also Bender v. Jordan*, 439 F. Supp. 2d 139,
2 176 (D.C. Cir. July 21, 2006) (finding irreparable harm where there was a threat of
3 an uninformed stockholder vote and a substantial likelihood that allowing the
4 election to go forward “would helplessly complicate matters, perhaps making it
5 impossible to unscramble the eggs should the post-hoc reorganization of a standing
6 board prove necessary.”).

7 Additionally, Koffey and Brennan are not working to achieve the most
8 value-maximizing deal for the sale of Consumer Products Business. *See* Compl. ¶¶
9 91-101. Not only have Koffey and Brennan urged the Board to delay assessment
10 on the Potential Joint Venture that could result in the highest reasonable price, but
11 Koffey has said Masimo should give the Consumer Products Business away for
12 nothing—both of which show a willingness to sell the business line for far less
13 than it’s valued. *See* Compl. ¶¶ 80, 98-101; *see, e.g., MONY Grp., Inc. v.*
14 *Highfields Cap. Mgmt., L.P.*, 368 F.3d 138, 148 (2d Cir. 2004) (finding irreparable
15 harm where uninformed proxy vote “could spell the loss of a business opportunity
16 that (by its nature) can only exist at one point in time and cannot be recovered or
17 repaired with money damages”). And Koffey is conspiring with plaintiffs in a
18 lawsuit that Masimo and the Board are defending, jeopardizing Masimo’s defense
19 (and potentially causing financial harm to the Company). *See* Compl. ¶¶ 102-05.

20 Without injunctive relief before the annual meeting, Masimo and its
21 stockholders, who were uninformed because of Defendants’ securities violations,
22 may be forced to endure a Politan-run Board making decisions that cannot be
23 unwound easily, if at all, even after Masimo prevails on its Complaint. Indeed, these
24 lies are already working as just in the past week Glass Lewis and ISS, proxy advisory
25 firms, have advised Masimo stockholders to vote their proxies for the Nominee
26 Defendants, citing Defendants’ lies as the truth. *See* Ex. 23 (Glass Lewis Report);
27 Ex. 24 (ISS report).

28

C. The Balance of Equities Favors Masimo

The balancing of equities also favors Masimo. *Winter*, 555 U.S. at 24. Masimo’s potential harm is great—without the limited injunction requested, uninformed stockholders may vote to change control of the Board to Politan. *See, e.g., Lone Star Steakhouse & Saloon, Inc. v. Adams*, 148 F. Supp. 2d 1141, 1150 (D. Kan. 2001) (balance of hardship “clearly favors” plaintiff where plaintiff subject to “irreparable injury to its reputation and shareholder trust,” and “may be subject to a major change” to its Board). In contrast, Defendants are not harmed by an injunction that simply requires them to correct their own false and misleading disclosures, which would involve little expense. *See id.*; *see also Allergan*, 2014 WL 5604539, at *16 (balance of equities for plaintiff where only cost to defendants was expense of making corrective disclosures). The requested relief would level the playing field for Masimo and allow stockholders to make an informed vote.

D. A Preliminary Injunction Serves the Public Interest

Masimo also satisfies the last *Winter* factor—the requested injunctive relief serves the public interest because it will lead to an informed stockholder vote. *See, e.g., Allergan*, 2014 WL 5604539, at *16 (“An injunction ordering corrective disclosures is also in the public interest, as it prevents an uninformed shareholder vote.”). Additionally, “effective enforcement of the federal securities laws promotes the public interest.” *Taseko Mines Ltd.*, 185 F. Supp. 3d at 94; *see also Lone Star Steakhouse & Saloon*, 148 F. Supp. 2d at 1150 (holding a preliminary injunction requiring a corrective disclosure served public interest because “the public interest always lies with the truth”).

E. No Security Should Be Required for the Preliminary Injunction

Although Federal Rule of Civil Procedure 65(c) states that a preliminary injunction requires the movant give “security in an amount that the court considers proper,” FRCP 65(c), the “district court retains discretion as to the amount of

security required, if any,” *Diaz v. Brewer*, 656 F.3d 1008, 1015 (9th Cir. 2011) (quotation omitted). And it is Defendants’ burden to “present[] evidence that a bond is needed.” *Conn. Gen. Life Ins. v. New Images of Beverly Hills*, 321 F.3d 878, 883 (9th Cir. 2003). The bond amount may be “zero” with no evidence of damage suffered from the injunction. *Id.* at 882. As discussed above, there is no chance, much less likelihood, of harm to Defendants here. Accordingly, no security should be required.

V. CONCLUSION

Masimo respectfully requests this Court issue an order preliminarily enjoining Defendants from voting any proxies solicited by them in violation of Section 14(a) or Rule 14a–9 until corrective disclosures are made.

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Respectfully submitted,

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